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WM. B. STANB

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 138.

AMERICAN RAILWAY EXPRESS COMPANY, A CORPORATION,
Petitioner,

vs.

A. J. LINDENBURG,

Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA.

REPLY BRIEF ON BEHALF OF THE AMERICAN RAILWAY
EXPRESS COMPANY, PETITIONER.

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It seems proper to file a reply brief in this case in view of the contentions advanced in the respondent's brief that, first, the petitioner has not been authorized by order of the Interstate Commerce Commission to establish and maintain rates based upon value and, second, that the respondent introduced the receipt in evidence for the purpose of showing that he did not measure his rights and the liabilities of the carrier relative to the shipment by it, and to further show that the carrier had not complied

with the terms and conditions of the second Cummins' Amendment or of the uniform express receipt authorized by the Interstate Commerce Commission. Such arguments are not only not sustained by the record but are in direct conflict with it.

Addressing ourselves to the first contention:—The order of the trial court recites (Transcript of Record, p. 10):

“* * * that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission, at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission, April 2, 1917, by supplemental order No. 18, and the defendant thereupon introduced in evidence a certified copy of said order, marked ‘Defendant’s Exhibit 1’; in effect on the line of the defendant company between Indianapolis, Indiana, and Charleston, West Virginia, at the time of the transportation and shipment in question; that the proper charge upon the total shipment of the defendant at the time the same moved from Indianapolis, Indiana, to Charleston, West Virginia, was \$1.76 per hundred pounds and 42¢ for a package of 10 pounds; that is to say for the transportation of said property at the time and between the points mentioned and at a valuation not exceeding 50¢ per pound; that the amount charged to and collected from the plaintiff on account of transportation of all of said property was the following; for a certain trunk weighing 200 pounds, delivered on the 24th of August, \$3.52, and 18¢ war tax; for a certain trunk weighing 100 pounds, delivered on the 22nd of August, \$1.76 and 9¢ war tax; and for the package, weighing 10 pounds, delivered August 6th, 42¢ and 3¢ war tax; that the charges collected on the shipment were normal express charges for transportation and no valuation charges were included therein upon any part of the shipment.”

The Defendant's Exhibit No. 1, referred to in the preceding order of the court is a copy of an order of the Interstate Commerce Commission issued on the 2nd day of April, 1917, In the Matter of Express Rates, Practices, Accounts and Revenues, Released Rates in which the Commission after reciting that on October 10, 1916, it had entered upon an investigation concerning the propriety of the issuance of an order authorizing the maintenance of express rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, authorized the establishment of such rates and to carry out the terms of such order prescribed a new form of uniform express receipt for use throughout the United States (a copy of this receipt appears at p. 17 of the Transcript of Record). It is significant that this form provides a blank for the insertion for the name of the express company by which it is to be used.

The order was not intended to be directed to specific companies but was for general application in the express transportation business by such companies as should bring themselves within the requirements of the Commission by the filing and publication of proper tariffs. In the opinion of the Commission, written in connection with the issuance of the order, 43 I. C. C., page 510, the Commission concludes with the statement, "an order will be entered authorizing the maintenance of existing express rates dependent upon the declared or released property transported, except ordinary live stock, also authorizing the form of express receipt to be used".

The form of express receipt thus prescribed by the Interstate Commerce Commission is the one introduced in evidence by the defendant and which the trial court found was in effect between the points of origin and destination of the shipment involved in this case on the date it moved and at that time duly published and filed with the Interstate Commerce Commission at Washing-

ton. The finding of the trial court to the effect that the said tariff providing alternative rates based upon the value of the property declared, was in effect, was expressly approved by the Supreme Court of Appeals of West Virginia in its opinion where it stated by Poffenbarger, J., at pages 37, 38:

"Under the authority thus conferred upon it, the Interstate Commerce Commission has authorized all property other than ordinary live stock, to be carried at rates dependent upon such declared or agreed values and limited liability. *That the property involved here could have been so carried is beyond doubt*, and it also falls within the class authorized to be carried on a value not exceeding \$50.00 for a shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for a shipment in excess of 100 pounds, unless a greater value is declared or agreed upon in writing. (Italics ours.)

For some reason presumptively found in necessity or expediency, the statute requires the declaration or agreement as to value to be made in writing, or rather does not authorize carriage under limited liability, nor the Commission to provide for it, except upon a written declaration or agreement as to value. In its prescription of the uniform receipt, the Commission has observed this requirement, by providing spaces for the value and the signature of the shipper. It has also interpreted the statute as requiring the carrier to give the shipper an opportunity to elect what value he shall declare, whether that specified in the classification for use in the absence of a declaration of any other, or some higher valuation imposing upon him a higher rate for transportation. In other words, the receipt contemplates a declaration of value by the shipper or an agreement with him upon the value in every instance. This seems to be the only interpretation of which the statute is fairly susceptible. It does not authorize either the Commission or the carrier to fix values. It says property may be authorized to be carried upon 'rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.' "

"As, in this instance, the carrier did not take from the shipper a written declaration of value nor a written agreement as to value signed by him, it failed to place itself within the requirements of the statute and the regulations of the Interstate Commerce Commission prescribed thereunder. In other words, it did not comply with the conditions precedent to its right to carry the property under a limitation of liability. It should have given him a receipt specifying a value fixed by himself, *and evidenced by his signature*. In doing so, it would have given him the option as to value contemplated by the law. In failing to do so, it denied him that option. Besides, it neglected to avail itself of the right conditionally conferred upon it by the statute and the regulations, by its failure to take his written declaration or agreement as to value. *A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him.*" (Italics ours.)

* * * * *

"To effectuate this purpose and adequately guarantee such right to him, it has been deemed necessary to require the carrier, in every instance, to allow him an opportunity to elect what value he will place upon his property, by taking his statement as to it, writing it in the receipt *and requiring him to sign it*. Imposition of this duty upon both parties prevents the carrier from fixing the value itself in the great majority of cases, as it did under the 'First Cummins Amendment.' Hence, the provision is a vital one and stands upon considerations of very great importance. (Italics ours.)

Upon these principles and conclusions the judgment complained of will be affirmed."

From this language it clearly appears that there was no thought in the mind of the Court of Appeals of West Virginia, of any failure of observance on the part of the petitioner to secure the authority of the Interstate Commerce Commission to maintain rates dependent upon value or of lack of proof of such fact in this case, but that its decision rested solely on the point that *the law*

required a signature by the shipper to constitute a valid agreement by him.

It is established in this case that the petitioner had in effect at the time this shipment was made a system of rates dependent upon value. Having been filed and being in effect, they must be accepted and enforced by carrier and shipper alike. The published tariff in effect is to be treated as though it were a statute binding upon the carrier and shipper. *Pennsylvania Railroad v. International Coal Mining Co.*, 230 U. S. 194, 197. Neither the carrier nor the shipper lawfully could escape or deviate from such published and filed tariffs. *Georgia, Florida and Alabama Railway Co. vs. Blish Milling Co.*, 241 U. S. page 190. *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U. S. 566. In the latter case, this Court quotes with approval, the following from *Boston & Maine Railway Co. vs. Hooker*, 233 U. S. 97, page 121:

“If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in Interstate Commerce.”

Had these rates not been authorized by the Interstate Commerce Commission, they would have been unlawful. The presumption, therefore, is that the maintenance of such rates had been authorized by the Interstate Commerce Commission, and in the absence of any proof to the contrary such presumption is conclusive. *Cincinnati and Texas Pacific Railway v. Rankin*, 241 U. S. 319, 327.

As to the second contention:—The record shows that the receipt and form of receipt introduced in evidence by the respondent as his Exhibits Nos. 1 and 2, were so introduced without qualification or restriction or reservation whatsoever as to the purpose of introduction (Transcript of Record, p. 9).

The respondent having introduced the receipt in evidence is bound by all of its valid terms and conditions. In our main brief, we refer to the case of *Bates v. Wier*, 105 N. Y. Supp., page 785, in which the Court specifically held that under such circumstances the plaintiff must accept the provisions of the receipt *in toto*, if at all. The same principle is announced in the case of *Inman v. Seaboard Air Line*, 159 Federal Reporter, 960.

We believe it is not improper for us to point out certain errors in the respondent's brief, doubtless due to inadvertence but, nevertheless material and misleading. Certain quotations have been found to be inaccurate, for instance, a quotation from *Corpus Juris*, Volume 10, page 194, on page 15 of the brief; and another from *Boston & Maine Railway v. Piper*, 246 U. S. 239, on same page of the brief. Other quotations cannot be found in the authorities to which they are ascribed and, at least, one other, on page 13, as taken from *Boston & Maine Railway v. Piper*, does not appear to be in that case. Again at pages 20 and 21 of the brief, appears what purport to be two extended quotations from authorities which are not named.

Respectfully submitted,

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